

Managing Legal Risks: Trends in Advertising Class Action Litigation (Third Quarter 2013)

Executive Summary

Complaints concerning food and dietary supplements continue to dominate civil class action complaint filings for the third quarter in a row.

This report analyzes class action complaints alleging unfair and deceptive acts and practices (“UDAP”) that were filed between July and September 2013 (the “period”).¹ The following are key findings concerning complaints filed during the period:

- A total of 40 UDAP class action complaints were filed over the period. The rate of complaint filings remained relatively stable throughout the period.
- While suits were filed against defendants in sixteen industries, half of the complaints were against the food (35%) and dietary supplement (15%) industries.
- There was a significant increase (+8) in the percentage of complaints filed against companies in the food industry.
- There was also a significant increase (+8) in the percentage of complaints filed against companies in the fashion industry.
- There was a slight increase (+2) in the percentage of complaints filed against companies in the retail industry.
- There was a significant decrease (-14) in the percentage of complaints filed against companies in the automotive industry.
- Even though the dietary supplement industry remained the number two industry UDAP complaints were filed against, there was a significant decrease (-9) in the percentage of complaints filed against companies in this industry.
- There was also a significant decrease (-8) in the percentage of complaints filed against companies in the weight loss industry.
- Although the complaints alleged a wide variety of legal theories, complaints concerning food labeling and/or nutrition content (22%), performance claims (20%), and “natural” claims (17%) made up nearly three-fifths of the complaints filed during the period.

¹ For an analysis of UDAP class action complaints filed in the first quarter of 2013, see [Goldman and Zetoony, Trends in Advertising Class Actions: First Quarter 2013](#). For an analysis of UDAP class action complaints filed in the second quarter of 2013, see [Goldman and Zetoony, Trends in Advertising Class Actions: Second Quarter 2013](#).

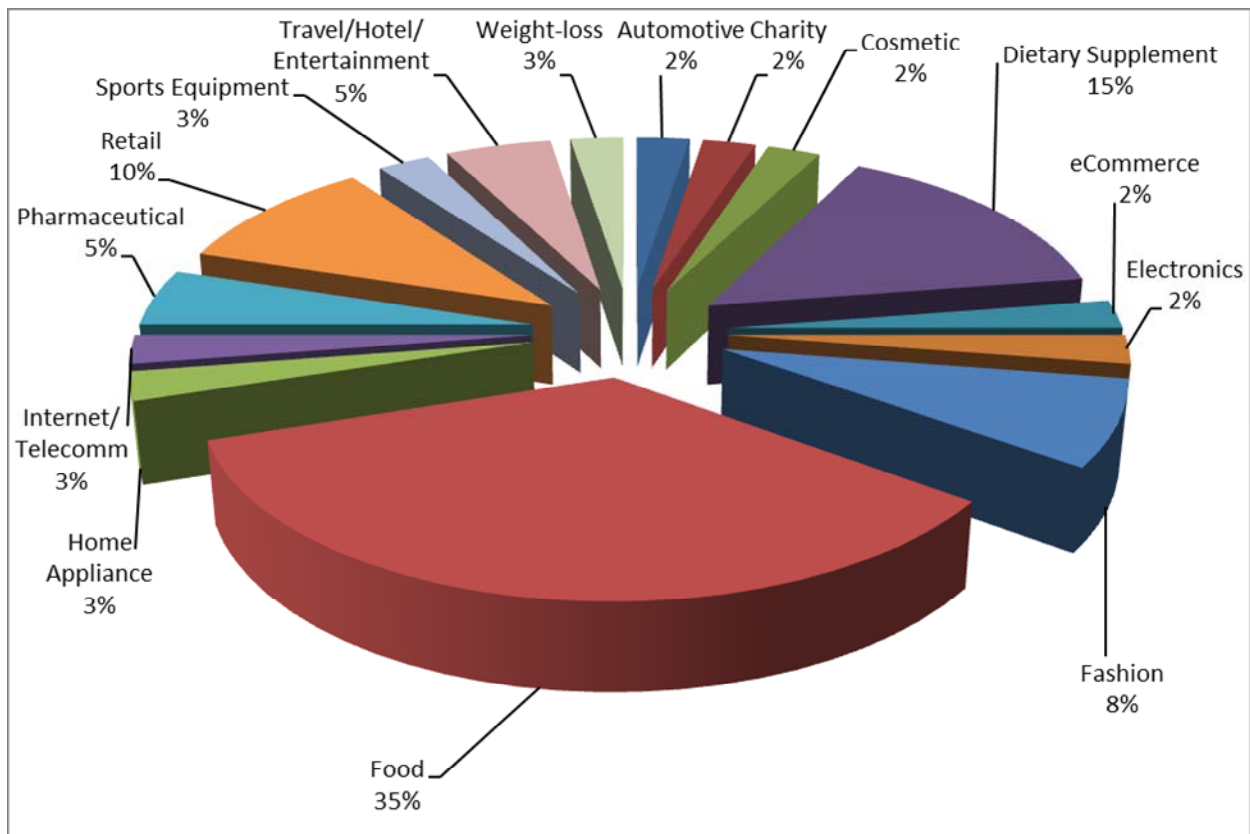
- While UDAP class action complaints were filed in a number of different state and federal courts, the most popular federal forums for plaintiffs were the Central District of California (22%) and the Northern District of California (15%). The most popular state court forum was also California (7%).

Part 1: Litigation By Industry

While companies in sixteen industries were targeted by class action plaintiffs alleging UDAP violations, the complaints were largely concentrated in the food and dietary supplement industries. Nonetheless, complaints against retailers, and specifically fashion retailers, have continued to rise and collectively account for over 15% of the complaint volume in the period. The concentration of complaints in two or three industries differs from the more even complaint distribution seen among other types of class action litigation.²








The following chart provides a breakdown of UDAP complaints by the industry in which the defendant operates. As the chart illustrates, complaints concerning food and dietary supplements continue to dominate filings, accounting for half of the total complaint volume during the period.

Percentage of Complaints by Defendant Industry



² See [Gajewski and Zetoony, *Managing Legal Risks: Trends in Mobile, Text Message, Fax, and Telephone TCPA Class Action Litigation \(First and Second Quarters 2013\)*](#); see also [Yung and Zetoony, *Managing Legal Risks: Trends in Data Privacy and Security Class Action Litigation \(First and Second Quarters 2013\)*](#).

Although it is difficult to draw conclusions based upon changes in any one quarter, there are a number of directional shifts that suggest changes in the industries targeted by consumer class action plaintiffs. While the food industry saw a decrease (-10) in the percentage of complaints filed from Q1 to Q2, and then an increase (+8) in the percentage of complaints filed from Q2 to Q3, it has remained the most litigated against industry in 2013. Similarly, while the dietary supplement industry saw an increase (+9) in the percentage of complaints filed from Q1 to Q2, and then a decrease (-9) in the percentage of complaints filed from Q2 to Q3, it has remained in the number two spot for litigated against industries throughout 2013. The directional chart below shows some additional key changes in a selection of other industries.

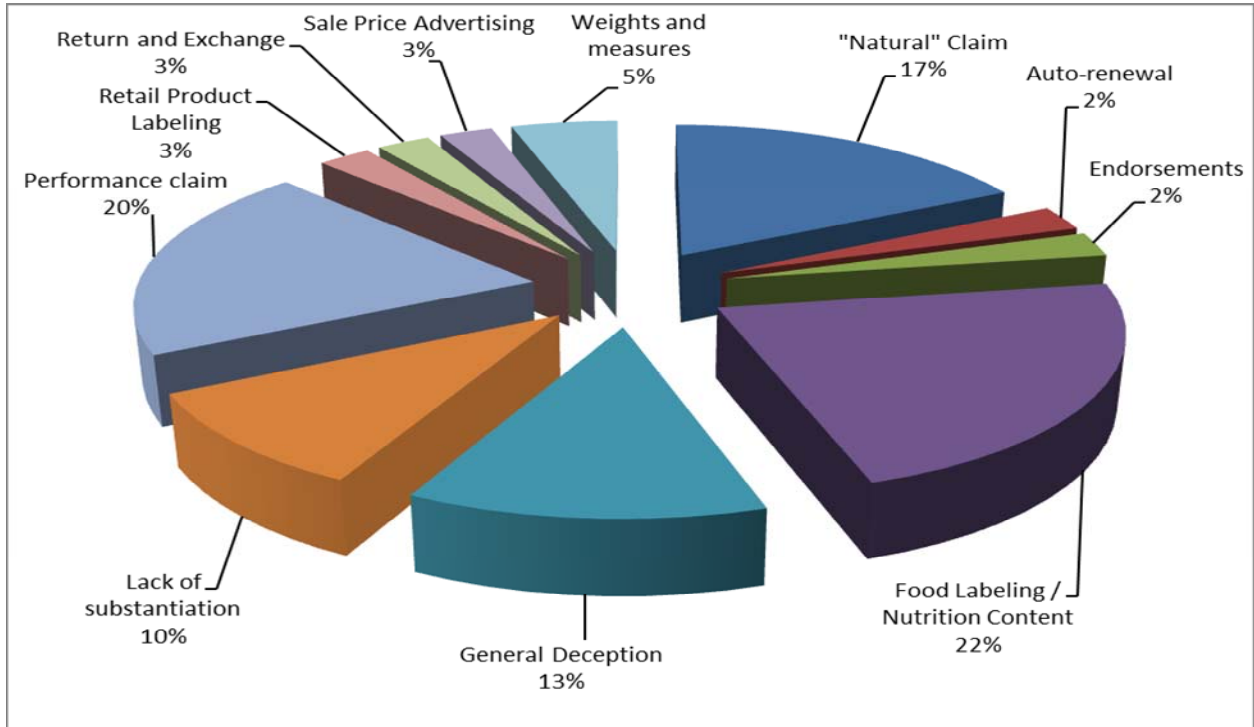
Industry	Q1 2013	Q2 2013	Q3 2013	Change from Q2 to Q3
Automotive	10%	16%	2%	 -14
Cosmetics	15%	0%	2%	 +2
Dietary Supplements	15%	24%	15%	 -9
Fashion	2%	0%	8%	 +8
Food	37%	27%	35%	 +8
Retail	3%	8%	10%	 +2
Weight Loss	2%	11%	3%	 -8

Part 2: Primary Legal Theories

The vast majority of UDAP class action complaints filed during the period related to food labeling and/or nutrition content (22%), followed by claims related to a product’s performance (20%). Closely following in third, were complaints regarding claims that a product was “natural” (17%).

The following chart provides a breakdown of the primary basis upon which the complaint alleged a UDAP violation. For purposes of this diagram, if a complaint included more than one legal theory (i.e., lack of substantiation and a performance claim) the legal theory that was predominantly discussed in the complaint has been included in the chart.

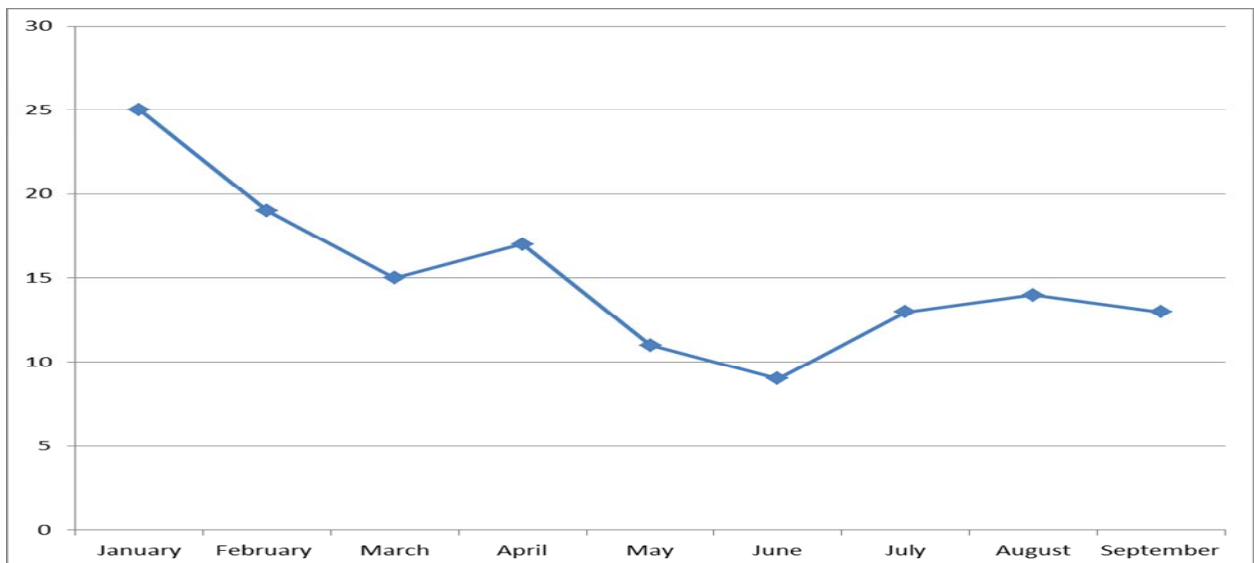
Class Action UDAP Complaints by Category of Claim



Part 3: Volume of Litigation

A total of 40 complaints were filed during the period, with complaint filings per month remaining fairly constant. In total, 136 complaints have been filed this year, with the most complaints filed in Q1.

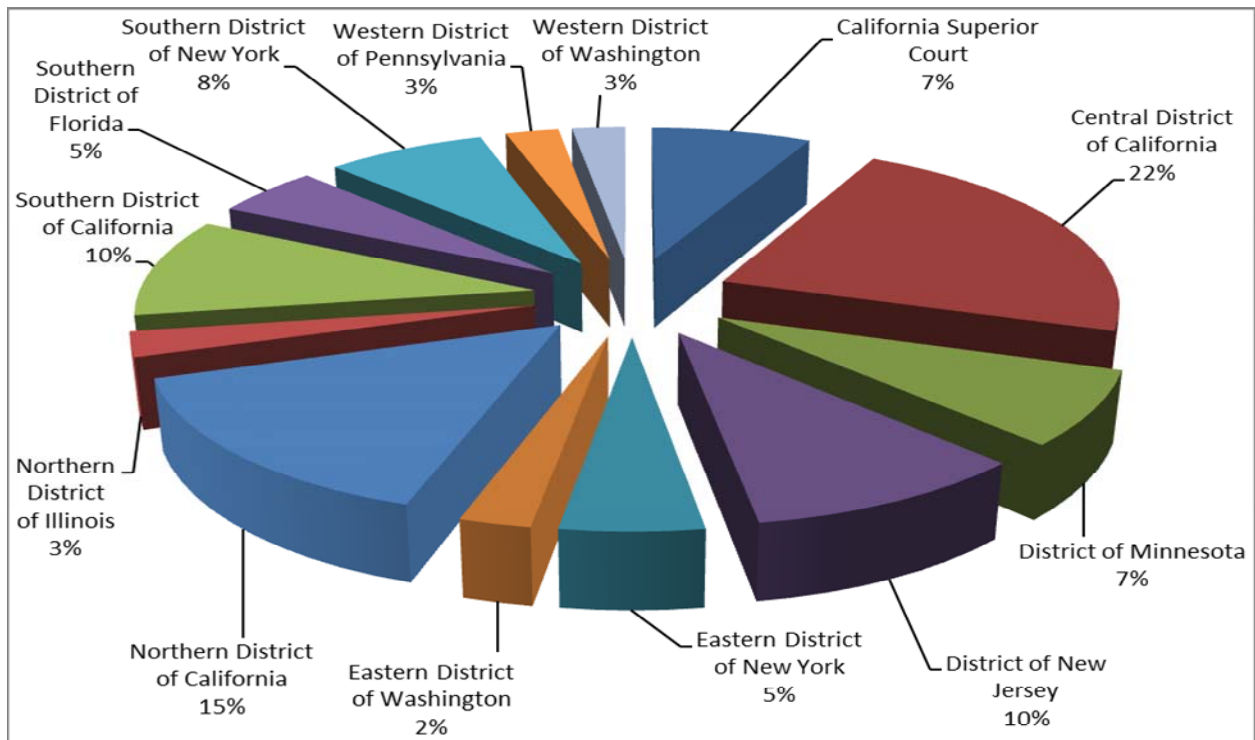
Volume of Complaint Filings by Month



Part 4: Favored Courts

During the period, complaints were filed in thirteen different courts. Among federal courts, the Central District of California (22%) and the Northern District of California (15%) received the most complaints. Among states, California (7%) also received the most complaints. Outside of California, the District of New Jersey (10%) and the Southern District of New York (8%) received the most complaints. The following chart provides a complete breakdown of the courts in which complaints were filed during the period.

Courts in Which Complaints Were Filed



Part 5: Methodology

Complaints included within the data analyzed by the report were identified by the Private Advertising Litigation (“PAL”) Committee of the Antitrust Section of the American Bar Association. The numbers and percentages in the accompanying charts are approximate.

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